regulation necessary, the total cost of regulation may be imposed directly upon that business. Thus, when South Carolina created a railroad commission, it assessed the whole expense of maintaining that body upon the roads operating within the state, and this was upheld as constitutional by the Supreme Court.[10] So the cost of inspection of mines may be put upon the owner.[11] The fact that the Adamson Law called for action involving expenditure directly by the roads, instead of for acts by government agents the cost of which would be shifted to the roads, should be immaterial.

Of course the amount of property taken under the Adamson Law can only be justified by reference to the particular and peculiar nature of the situation under which it was enacted. Yet weighing all the interests on either side we cannot say that the congressional decision that such measures were necessary was clearly unreasonable. Its constitutionality even as an experiment must therefore be sustained.

STATUTORY PRINCIPLES IN THE COMMON LAW. — There is a present tendency among the laity to criticise almost any court action or decision.[1] Apparently this dissatisfaction rests in good part, if not mainly, on the restricted scope accorded legislation by the courts.[2] In this regard, the criticisms have much justification. For the treatment of legislation by the courts has often been influenced by a distinct hostility felt by them against the intrusion of statutes into the common law.[3] Partially, however, the treatment has its cause in an apparent misapprehension as to the true function of legislation in our scheme of jurisprudence. For statutes have been considered, not an integral part of our organic legal whole but rather as rules to be applied in certain cases because so ordered by the legislature — rules that are somehow distinct

[10] Charlotte, etc. R. Co. *v.* Gibbes, 142 U. S. 386. So also where all electric conducting companies were required to file plans and reports with a commission for supervision, and the total cost put upon the companies. People *v.* Squire, 145 U. S. 175.

[11] Chicago, etc. Coal Co. *v.* People, 181 Ill. 270, 54 N. E. 961. So also People *v.* Harper, 91 Ill. 357 (inspection of grain elevators); Louisiana State Board of Health *v.* Standard Oil Co., 107 La. 713, 31 So. 1015 (inspection of coal oil); Morgan's Steamship Co. *v.* Louisiana Board of Health, 118 U. S. 455 (quarantine inspection of ship); Launer *v.* City of Chicago, 111 Ill. 291 (daily reports from pawnbrokers); State *v.* Cassidy, 22 Minn. 312 (tax on liquor dealers to support an inebriates' hospital). These cases show that causation in fact without culpability is sufficient to allow the shifting of the burden to the causing agent. *Cf.* also New York, etc. R. Co. *v.* Bristol, 151 U. S. 556 (entire cost of converting grade crossing into non-grade crossing put upon the railroad).

[1] The recurrent agitations for the recall of judicial decisions, and the proposed requirements for the judiciary in North Dakota (that is, that three of the five members of the Supreme Court shall be "*bona fide* farmers"), are manifestations of this dissatisfaction.

[2] A typical outburst occurred in the NEW REPUBLIC, January 1, 1916, in connection with the interpretation of the Massachusetts Workman's Compensation Act. In that case, however, the indignation was clearly unjustified. See 29 HARV. L. REV. 336.

[3] "There are great numbers of others [laws] the enforcement of which, or attempts to enforce which, are productive of bribery, perjury, subornation of perjury, animosity and hate among citizens, useless expenditure, and many other evils." CARTER, LAW, ITS ORIGIN, GROWTH AND FUNCTION, 3. See Roscoe Pound, "Common Law and Legislation," 21 HARV. L. REV. 383, 387.

and separated from our general body of laws.[4] This isolation of statutes from the rest of law prevents the establishment of the principle of a statute and allows only of a mechanical application of its wording.[5] The result is the much criticised limited scope accorded statutes.

Whatever may be the individual judge's view as to the nature of law, the basis of its effectiveness, and other theories [6] which might induce favorable or unfavorable treatment [7] of statutes, it is of course indisputable that in practice our juristic system must rest equally upon statute and common law. The recent past has seen a distinct systematization of our common law.[8] Its loose leaves have been and are being carefully indexed under general principles. But if all our statutes are to be treated as exceptions in the law, as incapable of creating principles, it will follow that by filling the gaps left by the wording of the statutes with contrary common law principles, we shall recreate the lack of unity we have just been remedying.

It will be argued that to do otherwise, *i. e.* to extend the principle expressed by the statute to cases not specifically covered by it, is judicial legislation, and not the function of the courts. Indeed, this was one of the objections raised in a recent English case [9] to such action. A submarine had been negligently run down by the steamship Amerika. The Admiralty sought to recover, among the items of damage, the amount due the families of the drowned sailors in pensions. In spite of the fact that Lord Campbell's Act had abrogated [10] the common law rule that a

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[4] Thus the Supreme Court has said of the Lord Campbell's Acts in America: "The common law, however, was modified by a statute which, as amended, became the statute under consideration here. By this statute the courts were given jurisdiction over certain actions of this description, while the common law was left to control all others. A discrimination was thus introduced into the law of the state." Moody, J., in Chambers *v.* Baltimore & Ohio R. Co., 207 U. S. 142, 149.

[5] The courts have been much freer in overlooking the words of a statute in order to restrict it, than in the converse case. Equity and the Statutes of Frauds have afforded many examples. In an interesting New York case a statute of wills was similarly treated, preventing a beneficiary who murdered the testator from taking, although the wording of the statute indicated no such exception. Riggs *v.* Palmer, 115 N. Y. 506, 22 N. E. 188.

[6] Theories of jurisprudence vary greatly as to the nature of law, etc. So Sir Frederick Pollock is quoted: ". . . on the other hand, the greater a lawyer's opportunities of knowledge have been and the more he has given to the study of legal principles, the greater will be his hesitation in face of the apparently simple question, what is law?" CARTER, *supra*, 9. In view of the diversity of ideas on these theories, it would seem necessary to treat these problems in a practical way and deduce theories rather from the result.

[7] Theories of natural law, for instance, have occasionally been responsible for weird decisions. See 29 HARV. L. REV. 521.

[8] Note, for instance, the effect of the work of Thayer and Wigmore, on rules of evidence, or the coherent growth of the law of quasi-contracts under Ames' doctrine of unjust enrichment. The law of torts is likewise gaining continuity, while Morris Cohen remarks: "Today we have not only a general theory of liability, but there is a marked tendency to make the law of torts and the law of contracts branches of the law of obligations." See Cohen, "The Place of Logic in the Law," 29 HARV. L. REV. 622, 624.

[9] Admiralty Commissioners *v.* S. S. Amerika, [1917] A. C. 38. The court based its decision on the alternative that as pensions were "compassionate" they were not items of damage anyway. But *cf.* United States *v.* Cornell Steamboat Co., 202 U. S. 184.

[10] There was further statutory legislation favoring a different decision, for the English Workmen's Compensation Act, 1906 (6 EDW. VII, c. 58, § 7, (1) (f)), provided that

death was not civilly actionable, to the extent of giving remedies to the husband, wife or legitimate child, the court refused to depart from the old rule. "It would be legislation pure and simple," remarked Earl Loreburn, while Lord Sumner quoted with approval the language of Lord Watson in earlier cases that the rule (Lord Campbell's Act) [11] allowing "actions for *solatium* and damages . . . at the instance of husband, wife or legitimate child, in respect of the death of a spouse, a child or a parent . . . does not rest upon any definite principle . . . but constitutes an arbitrary exception from the general law which excludes all such actions, founded in inveterate custom and having no other ratio to support it." [12] In other words the Act supplied a rule applicable only to certain cases, and any extension would be judicial legislation and accordingly improper.

If statutes were self-operative, or language a perfect medium for expressing thought, the attitude of the House of Lords might be justified. But statutes "do not interpret themselves; their meaning is declared by the courts, and *it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as law.*" [13] If the intention of a statute is clear, the court's work is simple. But what the exact intention [14] of a statute may be, whether it is expressive of a limited remedy, or whether it is expressive of dissatisfaction with a principle which it is desirous of overthrowing, is seldom self-evident from a reading of the act. In such case the court must use its own judgment.[15] In this it will be obviously affected by the circumstances of the

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an owner of a ship, having paid relatives under the Act for seamen killed by another boat's negligence, may sue such boat for the compensation so paid. Thus another statute recognized that the principle of the case was no longer existent.

[11] Bramwell, B., remarked of the recital of the Act: ". . . loose recital in an incorrectly drawn section on which the courts had to put a meaning from what it did not rather than did say." Osborn *v.* Gillett, L. R. 8 Ex. 88, 95.

[12] As far back as 1854, a travesty was anonymously published on the courts' method of interpreting statutes. It was supposed that a statute had been passed allowing of double issues in pleading, but the statute was restricted by the courts to pleas and not extended to replications. The language the author has put in the mouth of the judge (Sur. Bar.) bears a striking resemblance to the court's language in the principal case: Sur. Bar. — "This, Mr. Crogate, was a necessary consequence of the application of the established principles of pleading to the statutory privilege of pleading several matters. The Act of Parliament, in allowing this privilege, left special pleading in other respects as it previously existed; and consequently such plea was treated as if it were the only one on the case, and the court dealt with it upon the same principles that were applicable when the defendant was confined to a single plea." Crogate (the defeated suitor) — "And a pretty jumble you must make of it; for if I can make out your meaning, it seems to be this: that the Act of Parliament having altered your special pleading system, root and branch, and altogether put an end to your fine plan of chopping and lopping all questions, till you bring them to a single point; you still went on with your foolish quibbling rules, just as if you had still only one point to try." See Crogate's Case; A dialogue, In ye Shades.

[13] See GRAY, NATURE AND SOURCES OF LAW, § 366.

[14] "The principle of communication by words is wholly the same as that of signs; one means is complete, the other incomplete, but they work in the same way, neither gives the thought itself, however exact the expression of it may be; it gives only the invitation and the point of departure for it to reconstruct itself." 2 IHERING, GEIST DES RÖM. RECHTS, 444.

[15] "However clearly interpretation may recognize the real thought of the lawgiver, it can recognize it as establishing law only under the supposition that in the statement given by the legislator, an expression, if not a complete expression, of his real thought

passing of the act, and kindred indications. But it will come to its decision chiefly on its own feeling [16] of the desirability of the legislation, mirroring the current tendencies of the time in economics, politics and morality. Just as the court must decide the limitations and exceptions of a common law principle, so must it decide similar questions in the case of such statutes. Such an attitude towards statutes is by no means strange to the law. A striking example are the decisions [17] under the Statute 4 Edward III (1330), c. 7, which allowed the survival to executors of actions of trespass. The English courts, in applying the statute, extended it to administrators and included cases which did not lie in trespass. For it was said,[18] "The statute of 4 EDW. 3, being a remedial law, has always been expounded largely; and though it makes use of the word trespasses only, has been extended to other cases within the meaning and intent of the Statute." The Privy Council in a case [19] up from Canada, proceeded in a similar fashion. The Canadian law, by an Act similar to the English Sergeant Talfourd's Act, gave the courts discretion as to whether on separation the mother or father should have the custody of children below a certain age. But in dealing with children above the age specified by the Act, Lord Hobhouse nevertheless exercised his discretion, remarking, ". . . the course of legislation shows distinctly a growing sense that the power formerly accorded by law to fathers of families was excessive. . . . But it is impossible to measure by arbitrary limits of age the change of view which includes positive legislation. That change must also affect the question what is required for the welfare of the older children, etc. . . ."

Doubtless there is danger in such freedom of treatment. While uniformity is desirable in the law, the tremendous value of the experience of the past must not be overlooked.[20] Our common law principles have

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can be found. Therefore its principal, if not sole activity will consist in quantitative extension and limitation of the statute." 1 WINDSCHEID, PAND., § 22. "It is not the words of the law, but the internal sense of it, that makes the law; the letter of the law is the body, the sense and reason of the law are the soul." Eyston *v.* Studd, 2 Plowd. 459 (a).

[16] "The dependence of the statutes upon the will of the judges for their effect is indicated by the expression often used, that interpretation is an art and not a science; that is, that the meaning is derived from the words according to the feeling of the judges, and not by any exact and foreknowable processes of reasoning." GRAY, *supra*, § 374.

[17] The Statute of 4 EDW. III, c. 7 (1330) contains a recital that "in times past executors have not had actions for trespass alone to their testators, as of the goods and chattels of the same testators carried away in their life." So it enacted "that executors in such cases shall have an action against trespassers." Yet the courts have applied the statute to administrators; to actions for conversions of goods; to an action against a sheriff for making a false return, etc. See GRAY, THE NATURE AND SOURCES OF LAW, § 378.

[18] Wms. Saunders, 217 b.

[19] Smart *v.* Smart, [1892] A. C. 425.

[20] A splendid plea for respect for the past, as a counterbalancing agency to the modern forces of "anti-intellectualism," is made by Morris R. Cohen, in "The Place of Logic in the Law," 29 HARV. L. REV. 622. "They who scorn the idea of the judge as a logical automaton are apt to fall into the opposite error of exaggerating as irresistible the force of bias or prejudice." He counsels a happy medium: "We urge our horse down the hill and yet put the brake on the wheel — clearly a contradictory process to a logic too proud to learn from experience. But a genuinely scientific logic would see in this humble illustration a symbol of that measured straining in opposite

undergone to some degree the survival of the fittest — they have borne the test of time, while our statutes are too often born of emotions of the moment. But anachronisms do exist in the law. By the very nature of things our common law of today must represent the results of the economics of yesterday. When therefore a principle of the common law is obviously out of tune with the present, when indications, such as the popularity of remedial acts in other jurisdictions,[21] the prevalence of similar acts on analogous points in the same jurisdiction,[22] the probability that the principle was the result of procedural difficulties now swept away,[23] and the vindication of the change by the test of time [24] — when all these indications point the same way, it cannot be dangerous to let courts which have directed the growth of principles of law in the past, continue to obtain a systematic growth by treating such statutes as declaratory of a principle of law, and not merely a remedy for a class.[25]

PROOF OF CONTEMPORANEOUS PAROL CONDITIONS IN THE LAW OF BILLS AND NOTES. — It is laid down in discussions of the law of bills and notes that "If a bill or note be absolute upon its face, no evidence of a verbal agreement made at the same time, qualifying its terms, can be admitted." [1] It should not be necessary at this time to set forth that this is only the court-room application of a rule of law that such a verbal agreement, if proved, is immaterial.[2] But stated even so, the variants of the general rule are so numerous as practically to call for a new classification, a demand which Dean Wigmore's synthesis ably fulfills.[3] For the

directions which is the essence of that homely wisdom which makes life livable." Mr. Justice Holmes likewise gives indications of similar thought. In refusing to reverse a case on the ground that the plaintiff had refused to allow examination by the defendants' physician, the common law having no precedent on the point, he says: "It will be seen that we put our decision not upon the impolicy of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case." Stack *v.* New York, N. H. & H. R. Co., 177 Mass. 155, 159, 58 N. E. 686, 687.

[21] Lord Campbell's Acts are existent in practically all jurisdictions today.

[22] The somewhat analogous idea that actions of tort died with the wronged party has, as shown above, been swept away by 4 EDW. III, c. 7. The English Workmen's Compensation Act, 1906, § 7, shows the same tendency. See note 10.

[23] This is apparently the court's justification for the present decision. This argument that the rule, having had a basis when promulgated, was therefore good law, and so must be good law now, appears to be a nonsequitur. The language of Lord Parker that the House should not disturb a rule which, "however anomalous it may appear to the scientific jurist, is almost certainly explicable on historical grounds," is hardly soul-satisfying.

[24] Lord Campbell's Act was passed in 1846 (9 & 10 VICT. c. 93).

[25] An Illinois case brings out well the idea of treating a statute as a principle, together with a hesitancy to reach such result rashly. In Groth *v.* Groth, 7 Chicago L. J. 359, the court allowed the husband temporary alimony on a suit of divorce by the wife. This result had its basis in Married Women's Acts which had apparently laid down the principle of equality between man and wife. But the court justifies such conclusion drawn from the statute on the ground that not only today, but in Grecian times such equality existed, and it was only the temporary results of feudalism that had clouded the true light.

[1] 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 80.

[2] WIGMORE, EVIDENCE, § 2400, (1). See THAYER PRELIMINARY TREATISE ON EVIDENCE, 390.

[3] WIGMORE, EVIDENCE, § 2443. Dean Wigmore divides the terms of the instru-